SARAWAK TIMBER INDUSTRY DEVELOPMENT CORP

v.

BORNEO PULP PLANTATION SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[COMPANIES-WINDING-UP NO: 28-33-2002-III(I)]
3 SEPTEMBER 2004

COMPANY LAW: *Winding-up - Liquidator - Whether had discharged duties honestly and impartially - Misfeasance summons by contributory - Contributory having no sufficient interest in outcome of application - Whether summons must fail - Whether liquidation must proceed to completion - Whether liquidators to be released - Companies Act 1965 ss. 218, 227, 236, 355*

The petitioner, the respondent, APP and BPP had entered into several agreements in order to start a pulp manufacturing business in Sarawak. By the agreements, the petitioner and APP became the contributors of the respondent, while the petitioner, the respondent and APP became the shareholders of BPP. The petitioner's contribution in the respondent was in the form of plantation lands, which it secured from the State Government of Sarawak ('the Government'), while its shareholding in BPP took the form of a cash injection of RM121 million. APP had subscribed to 117 million BPP shares but the shares, to date, had remained unpaid and uncalled for.

Subsequently, the Government resumed the plantation lands, whereupon the respondent and BPP became insolvent and were wound-up. The liquidators of the respondent ('the liquidators'), in an attempt to avoid protracted litigation, and bring the liquidation to a speedy close, then entered into a Framework Agreement ('FA') and a Deed of Assignment Agreement ('DAA') with the liquidators of BPP, and following that, had the assets of the respondent distributed to the creditors. The settlement notwithstanding, the petitioner was still left with a net liability of RM3.8 million.

Having realised and distributed so much of the assets of the respondent as could in their opinion be realised and distributed, the liquidators filed a motion for their release and for the respondent to be dissolved. APP however opposed the motion, alleging misconduct and breach of duties against the liquidators. *Inter alia*, APP cited that: (i) the liquidators did not keep them informed of the liquidation process; (ii) the liquidators did not heed the legal advice given when executing the FA/DAA, and were biased towards the petitioner; (iii) the

liquidators were in breach of s. 236(1) of the Companies Act 1965 ('the Act') when entering into the FA/DAA without the required sanction; and (iv) there was a conspiracy between the parties to the FA/DAA to cause the petitioner to be unjustly enriched. APP hence applied for leave to commence proceedings for misfeasance against the liquidators.

The facts further showed that, after the filing of the motion, assets comprising of 2.7 million fully paid up shares in BPP had remained undistributed by the liquidators. That being so, before the learned judge herein, the liquidators sought leave to assign the said shares to the petitioner, as distribution in specie at par in part settlement of the remaining RM3.8 million owing by the respondent to the petitioner. APP however objected, arguing in essence that such failure to distribute prior to the filing of the motion had rendered the motion *void ab initio*.

The primary issues that arose were: (i) whether APP was duty bound to show, and if so whether it had shown, sufficient interest in the outcome of the action for misfeasance; and (ii) whether the liquidators could be said to have been in breach of their duties when entering into the FA/DAA against the advice of their legal advisors.

Held (dismissing the application):

[1] There must be more than a mere allegation to move the court into granting leave to bring an action against a liquidator. An applicant who takes out misfeasance proceedings against a liquidator must show that he has sufficient interest in the outcome of the application. In this case, APP must show that it has sufficient interest in the outcome of its application, in the sense that there was a surplus in the respondent for distribution to it as a contributory. The test is not met where there is no surplus for such distribution, which certainly seemed to be the case in the present winding-up. Further, when misfeasance proceedings are brought, it is necessary to prove pecuniary loss to the company. APP, however, could not show any loss to the respondent. (pp 596 b & 598 g)

[2] Nothing sinister could be read into the liquidators's failure to keep APP fully informed of the liquidation. In any case, such complaints were insufficient on their own to constitute wrongdoing. As to the liquidators having applied for their release four days before the expiry of the objection period, and not sending the required forms to APP, s. 355 of the Act made it clear that such defects would not invalidate the proceedings. (p 600 b-f)

[3] The liquidators did not follow the advice given by the legal advisors so as to avoid protracted litigation and also because there was no real prospects of any recovery of the outstanding lease rentals due from BPP as the latter was insolvent. This court would agree that the FA was in the best interest of the respondent. It provided a practical solution to all the claims faced by the respondent without the need for protracted litigation. It also allowed the liquidation to proceed to completion without undue delay and expense. (pp 602 g-h & 603 a)

[3a] In entering into the FA/DAA, the liquidators had discharged their duties honestly, independently and impartially. They did not compromise the interests of, or cause any pecuniary loss to, the respondent, nor did they misappropriate or misapply the funds or assets of the respondent. The allegations of misfeasance or of breach of fiduciary duties towards the respondent and APP were thus totally unfounded. (p 604 d-e)

[4] There was nothing in s. 236(1) to suggest that on making a winding-up order the court could not grant any of the powers mentioned therein to the liquidators or that such authority could only be given when the liquidators apply for a particular proposed exercise of the liquidators' power, as APP contended. The fact that s. 236(3) subjected the exercise of the liquidators' power to the control of the court would not prevent the court from granting the powers mentioned therein to the liquidators when appointing them, since the court continued to retain control over the liquidators even after the granting of such powers. (p 603 f & 604 a)

[5] The petitioner had injected the plantation lands into the respondent valued at RM105 million to be satisfied by the allotment by the respondent of RM105 million ordinary shares of RM1 each credited as fully paid. These shares, however, had never been allotted to the petitioner. In the event, there was no basis in the accusation that the compensation of RM101 million for outstanding sub-lease rentals received from BPP was being wrongfully diverted to the petitioner, since such compensation had been utilised to settle the respondent's outstanding liability of RM105 million aforesaid. Consequently, there was also nothing in the allegation regarding a conspiracy to cause financial loss to APP or to enrich the petitioner. (p 605 e-h)

[6] APP had not discharged the onus of making out a *prima facie* case for leave to commence action against the liquidators for misfeasance. Likewise, no good reasons were given to justify an inquiry into the conduct of the liquidators under s. 277(2) of the Act. (p 606 a)

[7] The failure to distribute the 2.7 million BPP shares prior to the filing of the motion did not render the liquidators' motion *void ab initio* because the application has not been determined and is still pending before the court. There was also no need to dismiss the motion as the liquidators have taken steps to distribute the assets and there was evidence that all the assets of the respondent that were realised by the liquidators have fully been distributed. In any case, the court accepted the liquidators' explanation for the omission. Through genuine inadvertence, these shares had been omitted from the DA. (pp 606 h & 607 d)

[APP' application dismissed. Liquidators' motion for a release granted.]

Case(s) referred to:
Cavendish-Benticnk v. Fenn [1886-90] All ER 333 ***(refd)***
Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***
Re B Johnson & Co (Builders) Ltd [1955] 1 Ch D 634 ***(refd)***
Re Etic Ltd [1928] Ch D 861 ***(refd)***
Re Siromath [1991] ACLC 1, 587 ***(refd)***
Re-Budget Floor Coverings Pty Ltd [1982] 1 ACLC 312 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Sydlow v. TG Kotselas [1996] 14 ACLC 846 ***(refd)***
TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow [1996] 4 MLJ 567 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 227(2), 236(1), (3), 355

Reported by WA Sharif

JUDGMENT

Clement Skinner J:
This is the hearing of two applications before the court. Before describing them it will be helpful to first state some introductory facts.

On 15 January 2003 an order was granted for the winding up of the respondent company Borneo Pulp Plantation Sdn Bhd at the instance of the petitioner herein on the grounds that it had lost its substratum. The substratum consisted of:

(a) several pieces of land over which it was to establish a tree plantation for the manufacture of pulp, which was resumed by the Government of Sarawak in the year 2002; and

(b) its shareholding, amounting to 20% of the issued share capital of a related company called Borneo Pulp & Paper Sdn Bhd (hereafter 'BPP', which was set up to operate the tree plantation and the pulp mill, but which was ordered to be wound up on 20 September 2002.

On the respondent being wound up, the court appointed Encik Mustapha Bin Mohamad and Mr Jeyaraj a/l Ratnaswamy as joint and several liquidators (hereafter together referred to as 'the liquidators') of the company. When granting the winding up order the court also granted certain other specific powers to the liquidators which included the power: "(c) To compromise any calls and liabilities to calls, claims, debts and liabilities, and to give a complete discharge in respect thereof; and "(d) To enter into compromise, settlement and/or arrangement with any creditor or person having any claim present or future, certain or contingent, against the company". The granting of such powers to the Liquidators has been called into question by Asia Pulp & Paper Co Ltd ('APP') a contributory of the respondent in these proceedings.

Following their appointment, the Liquidators say they have realised so much of the property and assets of the respondent as can in their opinion be realised. They have also caused a Final Report of the Liquidation of the respondent to be filed with the court. To reach the position they have, the Liquidators have dealt with other parties, namely, the petitioner as well as those persons who have been appointed as either the Liquidator or managers and receivers of BPP, to resolve certain claims and cross-claims arising between them. To resolve such claims the Liquidators and the other parties I have just mentioned entered into a framework agreement on 26 June 2003 and a deed of assignment on 30 June 2003. APP questions the Liquidators in having done so.

As I mentioned a moment ago, the Liquidators, believing that they have realised so much of the property and assets of the respondent as can in their opinion be realised and having filed their final report, wish to bring the liquidation to an end by being released as Liquidators and having the respondent dissolved. That is the first application before the court and the orders were sought by way of a motion.

On the hearing of the motion, APP appeared and opposed it and complained that:

(a) the Liquidators had not provided it with sufficient information regarding the respondent's liquidation and only came to learn of the matters they now complain about on being served the motion papers;

(b) the petitioner had made various payments totalling some RM79 million to the secured creditors of the respondent and had thereby become the assignee of all the secured creditors' rights, benefits, title and interest but the Liquidators had failed to inform APP about these payments;

(c) the Liquidators had entered into the framework agreement and the deed of assignment, again without disclosing this to APP.

APP complained that in conducting themselves in the above manner, in particular in failing to obtain the approval of the court or a committee of inspection to enter into the framework agreement and deed of assignment, the Liquidators had failed to discharge their duties fully and properly. Accordingly, APP indicated that they would be seeking leave of the court to bring proceedings against the Liquidators for misfeasance in the discharge of their duties. In view of the allegations made against the liquidators I ordered the motion to be stood over until APP had an opportunity to file their application.

On 22 August 2003 APP filed an application by way of a summons-in-chambers, for leave to commence and prosecute proceedings, in its own name and/or on behalf of the respondents, against the Liquidators for "any misfeasance in such manner as the applicant may be advised". APP also exhibited a draft statement of claim to their application, in which they set out their various complaints. So the second application before the court is APP's application for leave to bring malfeasance proceedings against the Liquidators. As the application for leave to bring misfeasance proceedings, if allowed, will have a telling effect on the motion to discharge the Liquidators, I ordered that it be heard first.

Before APP filed their application for leave, they requested a firm of chartered accountants based in Kuala Lumpur, M/s Moores Rowland to review documents which they had in their possession relating to the liquidation process of the respondents, and to give their report.

Moores Rowland have done so in a report dated 17 September 2003 (hereafter 'the Moores Rowland report'). I should further mention that the allegations made by APP against the Liquidators also concerned other parties not before the court, namely, the liquidator and receivers and managers of BPP, so I directed that all affidavits be served on them as well so that they could respond, if they wished to. They did do so, essentially denying any allegation of wrongdoing or of any involvement in any conspiracy with the Liquidators as alleged by APP. The petitioner also revealed that throughout the negotiation of the framework agreement they were advised and represented by a firm of Chartered Accountants, Pricewaterhouse Coopers Advisory Services Sdn Bhd

(hereafter 'PWC'). At the petitioner's request PWC has examined the financial impact of the framework agreement on the respondent, BPP, the petitioner and APP and presented their report on the same dated 9 October 2003 (hereafter 'the PWC report') in which they have for purposes of illustration, prepared a pro-forma statement of final liquidation account based on two scenarios, the first in the absence of the framework agreement and secondly on completion of the framework agreement. The PWC report shows that APP suffers no financial loss as a result of the framework agreement and the deed of assignment.

Returning to APP's application for leave to commence proceedings for misfeasance, having perused their application and the affidavits filed in support of their application as well as the draft statement of claim, I agree with counsel for the Liquidators that APP's application raise five main issues, namely:

(1) whether APP can show it has sufficient interest in the outcome of an action for misfeasance?

(2) whether the liquidation was carried out in haste, without full disclosure or with late disclosure;

(3) whether the Liquidators distributed the surplus to the petitioner and were in breach of their duty?

(4) whether in entering into the framework agreement the Liquidators acted against the advise of M/s Sri Ram & Co and breached their fiduciary and statutory duties?

(5) whether there was a conspiracy between the Liquidators and the other parties to the framework agreement to cause the petitioner to be unjustly enriched?

To better understand these four issues, it will be necessary to refer to certain background facts that led to the establishment of the respondent, BPP, the joint venture entered into between the petitioner and APP in regard to the respondent and BPP, the events which led to the winding up of the respondent and the collapse of the joint venture between the parties.

On 26 June 1996 the petitioner, which is the Sarawak Timber Industry Development Corporation, a statutory organisation established under the Sarawak Timber Industry Development Corporation Ordinance, 1973 (Ord No. 3/73) entered into two agreements with APP: (i) a Shareholders Agreement pursuant to which the respondent, Borneo Pulp Plantations Sdn Bhd

was formed with the petitioner holding 70% of the issued share capital and APP holding the remaining 30%; and (ii) a joint venture agreement pursuant to which a related company, Borneo Pulp & Paper Sdn Bhd or BPP was formed.

The obligations of the petitioner under the shareholders agreement were basically to procure the alienation of land from the Sarawak State Government to the respondent and to pay the premium due to the State Government for such land, the intention being that trees were to be planted on the land to feed a paper mill.

The obligations of the petitioner under the joint venture agreement in relation to BPP were to procure a lease of land from the Sarawak State Government on which a pulp mill ('the Pulp Mill') would be constructed and operated.

Pursuant to the terms of the shareholders agreement, the petitioner did cause 28 parcels of land ('the plantation lands') covering some 205,958 hectares to be alienated to the respondent and the petitioner issued an invoice for some RM105 million to the respondent which was to be settled by the allotment and issuance of shares in the respondent credited as fully paid up. A proportionate amount of shares were to have been allotted and issued to APP for cash. The respondent did not allot or issue the shares to either the petitioner or APP. Therefore a debt of RM105 million remained owing by the respondent to the petitioner.

The plantation lands were then charged by the respondent to secure banking facilities in the aggregate sum of RM250 million given to BPP by a syndicate of lenders ('the lenders'). Both APP and the petitioner executed proportionate guarantees in favour of the lenders, APP being liable for 66% and the petitioner 24% of monies due under the facilities.

The plantation lands were sub-leased by the respondent to BPP for 59 years 11 months at a total rental of RM105 million payable annually in arrears, the rental to be set off against unpaid shares issued by BPP to the respondent. At the date the plantation lands were resumed by the Government of Sarawak, about 81 million shares allotted and issued to the respondent were unpaid.

APP's obligations under the joint venture agreement in relation to BPP were to:

(i) Undertake the construction and establishment of the Pulp Mill;

(ii) Establish the tree plantations;

(iii) Undertake the overall management and control of the operations of the Paper Mill;

(iv) Ensure the Pulp Mill shall have a production capacity of at least 750,000 metric tonnes per annum; and

(v) Arrange for all the financing.

Out of the some 200,000 hectares of tree plantations to be established, APP had only established some 16,019 hectares, or 8%. Construction of the pulp mill never started, although site clearing, road preparations and temporary facilities were carried out.

On 2 March 2001 APP declared a unilateral worldwide moratorium on payment of all its debts totalling about USD 14 billion.

In May, 2002 the plantation lands were resumed by the State Government of Sarawak. As a result of the resumption, the State Government made an award of compensation of some RM133 million from which was deducted at source RM121 million being premium still outstanding. The balance of RM12 million was paid to the lenders who were chargees of the land.

On 5 August 2002, the lenders placed BPP under receivership pursuant to a debenture executed by BPP in favour of the lenders.

On 20 September 2002 BPP was ordered to be wound up by the Kuching High Court in Petition No. 28-27-2002-III-I pursuant to s. 218(1)(e) Companies Act 1965 on the ground that it was unable to pay its debts.

On 15 January 2003 the respondent was ordered to be wound up in this petition. Prior to the winding up order, APP did seek leave to appear at the hearing but leave was refused and APP did not appeal against the refusal.

On 23 April 2003 the petitioner paid a sum of some RM75 million being the balance then owing to the lenders who in turn assigned all their rights interests and benefits under the debentures and the proportionate guarantees to the petitioner.

After the winding up order was made against BPP, the liquidator of BPP claimed to be entitled to the sum of RM121 million which was deducted from the compensation awarded by the Government on the resumption of the plantation lands. The claim of BPP's liquidator was disputed by the petitioner and the Liquidators (of the respondent).

The claim of BPP's liquidator triggered off the following claims which were raised between and among BPP, the respondent and the petition:

(i) BPP's claim against the petitioner for RM121 million being the sum set-off or deducted at source by the State Government from the compensation for the resumption of the plantation lands.

(ii) The petitioner's claim against the respondent for RM105 million for the value of the plantation lands alienated to the respondent.

(iii) The respondent's claim against BPP for RM101 million as compensation for loss of the plantation lands based on the agreed rental for the sub-lease.

(iv) BPP's claim of RM81 million against the respondent for calls to be made on unpaid shares issued by BPP to the respondent.

It will be convenient to pause here to note that as a result of the issues arising from the resumption of the plantation lands by the Government vis-a-vis the shareholders agreement, the joint venture agreement and the sub-lease of land to BPP including the respondent's winding up, the Liquidators sought advice from M/s Sri Ram & Co (hereafter 'the legal advisors') about the consequences of what the Liquidators regarded as the frustration of the agreements entered into between the parties, when the Government resumed the plantation lands. On 20 May 2003 the Legal Advisors gave their advice to the Liquidators as requested. APP now complains that the Liquidators did not act in accordance with the advice given. More will be said on this shortly.

Returning to the narrative of events, to resolve their claims a settlement was reached between the parties in the terms of the framework agreement dated 26 June 2003 and the deed of assignment dated 30 June 2003. The settlement arrived at was basically that:

(i) The petitioner agreed to account to BPP for the RM121 million deducted by the Government from the amount awarded for resumption of the plantation lands.

(ii) In turn, BPP agreed to account to the respondent for the balance of the rental on the sub-lease amounting to RM101 million, which BPP settled by crediting RM81 million towards the 81 million unpaid shares issued to the respondent plus an acknowledgement of debt ('I.O.U.') of some RM20 million.

(iii) The respondent in turn passed or assigned these two items ie, 81 million fully paid BPP shares plus the I.O.U. to the petitioner in settlement of the RM105 million owing by the respondent to the petitioner.

(iv) The net effect was, the petitioner accounted for RM121 million to BPP and got, in exchange, 81 million (practically worthless) BPP shares plus and I.O.U. of RM20 million from BPP.

(v) BPP then utilised the RM121 million to pay the secured creditors (effectively a set-off with the petitioner of RM75 million), unsecured trade creditors (about RM20 million) and other creditors (comprising the debt of RM20 million the respondent assigned to the petitioner under the I.O.U.) and other debt due to the petitioner, leaving a credit balance of RM1.48 million available for distribution.

It is the petitioner's stand that APP is not entitled to a distribution of any surplus assets, because there is a sum of RM117 million owing to BPP in respect of 117 million shares issued to APP which remains uncalled and unpaid.

So much for the background facts, the complaints of APP and the issues arising from APP's application for leave. This will be a convenient place to make reference to the law on the matter at hand.

As officers of the court, the Liquidators are subject to the supervision and control of the court. The statutory provisions relating to such supervision and control are provided by s. 277(2), (3) and (4) of the Companies Act 1965 ('the Act').

Section 277(2), (3) and (4) read:

> (2) The Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it think fit.
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> (3) The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit.
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> (4) The Court may at any time require any liquidator to answer any inquiry in relation to the winding up and may examine him or any other person on oath concerning the winding up and may direct an investigation to be made of the books and vouchers of the liquidator.

However it is equally clear that the court will not allow the liquidator to be subjected to unnecessary litigation or for the winding up process to be wrongfully impeded. One way in which the court achieves this is by requiring the grant of leave before an action can be brought against a liquidator. Thus in the Australian case of *Sydlow v. TG Kotselas* [1996] 14 ACLC 846 at p. 852, it was held:

> ... the Court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongfully impede that process. One way in which this can be carried out is to require the grant of leave by the Court in respect of any action against an official liquidator, so that the Court can satisfy itself that there is no wrongful interference with the process.

And in another Australian case, *Re Siromath* [1991] ACLC 1,587 it was held:

> The control by the Court over the circumstances in which, and the extent to which, its own officers are to be subjected to personal pecuniary liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the Court of its own process ... .

In *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11, the Court of Appeal held that a liquidator, having been appointed by the court and being an officer of the court, it goes without saying that leave of the court is required before an action is commenced against him and officers like him.

In *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1996] 4 MLJ 567 Kamalanathan Ratnam JC (as he then was) held that a *prima facie* must be established before leave will be given to sue a liquidator. The learned judge's reasons for requiring a clear case to be made out were these (at p. 588):

> His [the Liquidator's] task is an onerous one. He is charged with a number of statutory duties and he has a right to apply to Court for directions and guidance. He is an officer of the Court. He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might level against him. He ought to be protected against such abuse unless there is sufficient *prima facie* evidence to support such allegation. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegation he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.

I agree with the reasoning of the learned judge that there must be more than a mere allegation to move the court into granting leave to bring an action against a liquidator.

Case law also shows that when misfeasance proceedings are brought it is necessary to prove pecuniary loss to the company. In *Re Etic Ltd* [1928] Ch D 861 the court had to consider the scope of s. 215 of the English Companies (Consolidation) Act 1908 which provision empowered the court on "the application of the official receiver or the liquidator or any creditor or contributory to examine into the conduct of the promoter, manager, or liquidator, or officer (of the company), and compel him to repay ... in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just". In delivering judgment, Maugham J stated at p. 875 that the right of action was:

> Limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty, of course, would include a misfeasance or breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company.

And in *Cavendish-Benticnk v. Fenn* [1886-90] All ER 333, Lord Herschell explained that proof of loss to the company is essential to maintain an action for misfeasance and breach of duty. At p. 339 para 'D' His Lordship said:

> A creditor or contributory has no duty owing to him; there is no duty or breach of duty in respect of which he can maintain an action; but he has a right to the extent that if, owing to a misfeasance or breach of duty, the funds of the company in which he is interested have been diminished, those funds shall be made good, and the assets of the company shall be recouped the loss which they have sustained. Therefore, I think that, assuming that a breach of duty such as is suggested would be a misfeasance, giving rise to an application under s 165 such an application could only succeed where it could be shown that the breach of duty resulted in loss to the funds and assets of the company.

With the above in mind, I now turn to consider each of the issues earlier identified:

1. Can APP show it has sufficient interest in the outcome of an action for misfeasance?

It is the Liquidators' case that as APP is seeking leave to commence proceedings for "any misfeasance in such manner as the applicant may be

advised", APP should be able to show that it has a sufficient interest in the outcome, in the sense that there is a surplus in the respondent for distribution to it as a contributory.

Counsel for the Liquidators submitted that even if the framework agreement (which APP seeks to invalidate) were to be non existent, the respondent would still be insolvent. Counsel points out that the respondent was faced with a net liability of RM3.8 million because it had one single major liability, namely, of RM105 million owed to the petitioner for the value of the plantation lands alienated to the respondent and one single contingent asset, namely, the RM101 million being the claim for compensation against BPP for loss of sub-lease rental resulting from the resumption of the plantation lands by the Government. Counsel further points out that this position is clearly borne out by the revised assets and liabilities of the respondent stated in para. 2.7 of the report presented to court by the Liquidators pursuant to s. 235 of the Act. Thus, it is the Liquidators' contention that as a contributory it is impossible for APP to derive any benefit from the proposed litigation simply because there is no surplus for distribution and so APP cannot be really interested in the outcome of the proceedings.

In my judgment there is case law to support the contention of the Liquidators. In *Cavendish-Benticnk v. Fenn (supra)* a contributory applied for a declaration that the director was guilty of misfeasance and breach of trust in connection with the purchase by the company of certain coal yielding properties in which the director was interested and claimed for repayment to the company by the director of the price paid for the properties. Speaking for the House of Lords, Lord MacNaghten stated the requirements to be satisfied by an applicant to succeed in the action, at p. 342:

> It has also been settled that the misfeasance spoken of in the section is not a misfeasance in the abstract, but a misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been hitherto judicially determined and the appellant is bound to show that he is interested in the result of the application, but I certainly think that it must be so. I cannot think that Parliament intended that a person coming under the description of a creditor, or a contributory, should take upon himself the novel position and the important functions of a public prosecutor in a matter in which he had no concern. It was, therefore, in my opinion, necessary for the appellant to show first that Mr. Fenn had committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton company; secondly, it was necessary for him to show that by reason of that misfeasance the company had sustained loss; and it was also necessary for him to show that he had an interest in the result of the application. I am of opinion that the appellant has failed to establish any

> one of those propositions. [HIS LORDSHIP referred to the evidence]. He has really no interest in the subject-matter of the application. I do not think that he was a creditor, and as a contributory it appears to me that it is utterly impossible, upon the facts as stated by himself, that he could ever derive any benefit from this litigation.

Many years later in *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch D 634, the application before the court was for an order for investigation into the conduct of the receiver and the liquidator on the ground, *inter alia*, that the receiver had, on his appointment not continued the company's business, but had sold certain building estates belonging to the company which had partially erected houses thereon, with resultant loss to the company. Lord Evershed MR in his judgment stated at pp. 655-656:

> It is, I think, tolerably clear that an applicant under section 333 must establish that he has a real interest in the subject-matter as to which he proposes to claim. (See, for example, the judgment of Maugham J in the *Etic* case). The facts in this case show that, by an extremely narrow margin, namely, Pound Strelling 83 or so, there was just sufficient to pay the secured creditors; but that, on the facts before us, there are claims of unsecured creditors in addition (for whom only the Pound Strelling 83 is available) amounting to Pound Strelling 10,000. It is obvious, therefore, that the difference between Pound Strelling 8,600 and Pound Strelling 4,500, even with some further sum for loss of development profit added, would be quite insufficient to provide in full for the creditors and leave anything at all for the contributories.
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> On that ground, therefore, I think it quite clear that the plaintiff has failed to show a sufficient interest in the subject-matter of his claim, and that it would not, therefore, be right to permit any amendment which might reconstitute or make somewhat more convincing (if I may say so) the charges made against the liquidator in paragraph 10 of the summons.

The passages from the judgments in the two cases I have just referred to show that an applicant taking out misfeasance proceedings against a director, receiver or liquidator of a company must show that he has a sufficient interest in the outcome of the application, and that the test is not met where it is shown that there is no surplus for distribution to the contributories, which certainly seems to be the case before me now in this winding up.

Although counsel for APP has not submitted that APP is able to show that there will be a surplus for distribution, he does say that APP can show a *prima facie* case of loss to the respondent in two instances. First, there is the claim against the Government for payment of increased compensation in respect of the resumption of the plantation lands which is unresolved and second the agreement by the Liquidators to pay the unpaid capital ie, of RM81 million

for shares which had been previously issued to the respondent to be satisfied via capitalisation of future rentals under the sub-lease over 59.11 years. Counsel for APP goes on to say that even if APP cannot show a *prima facie* case on liability or loss, at the very minimum, they have shown a case for further inquiry under s. 277(2). I do not agree. With regard to the first point taken about the claim against the Government for increased compensation not being resolved yet, that fact would not supply APP with a sufficiency of interest in the outcome of the application which it lacks, because it is pointed out by the receivers and managers of BPP, Mr Ler Cheng Chye (in paras. 15 and 16 of his affidavit of 9 October 2003), and also in para. 9(a) of the PWC report, that the claims presently pending in the High Court at Bintulu and Sibu for extra compensation in the sum of RM10.1 million is made by BPP and if the court does make an award, it will go to BPP and not the respondent.

With regard to the second point taken about the Liquidators having agreed to pay the unpaid capital of RM81 million for shares, this constitutes one of the complaints raised by APP about the Liquidators having acted against the advice of its Legal Advisors and as will be seen shortly when the matter is addressed, cannot provide APP with a sufficient interest in the outcome of the application.

With regard to APP's fall-back position that at the very minimum, it has made out a case for further inquiry under s. 277(2) of the Act, this is best decided after all the issues raised have been considered.

In my judgment, in making the application for leave, APP has not shown a sufficient interest in the outcome of the application.

2. Was the liquidation carried out in haste, without full disclosure or with late disclosure?

APP complains that barely six months after the making of the winding up order against the respondent the Liquidators have filed their motion for release and for the respondent to be dissolved. APP has read something sinister into this and keeps asking why the haste? It also complains that it was not kept sufficiently informed about the liquidation and so poses the question: What is it that the Liquidators have to hide? Having heard the parties now on all the complaints which have been given a full airing, I do not think it can be said that the Liquidators have anything to hide.

With regard to the speed with which the Liquidators have filed their final account and applied for a discharge and the question whether they have proceeded with undue haste, these are matters that must be considered in the light of other relevant factors such as the nature of the business of the respondent, the extent of its operations and what the liquidation entailed etc. In this regard Moores Rowland in their report (at p. 3) does make a pertinent

observation that the respondent's contingent assets of more than RM100 million referred to only 'one single item' and observed 'This was not a case where the amount was made up of numerous items, where one would expect realisation to take a protracted period of time'.

With regard to APP's complaints that they were not readily provided with information regarding the liquidation and the premature filing or non-filing of Forms with the court, Moores Rowland in their report recognised that these complaints are insufficient on their own to constitute wrongdoing and there was a need to consider further questions, namely, whether the final settlement of the land resumption matter could have assumed a different course if there had been a full disclosure? Whether full disclosure would have made any difference to the final outcome of voting at the adjourned meeting of the contributories? Whether the haste and lack of disclosure has resulted in any financial loss to APP?

A major feature of this liquidation is the entering into of framework agreement and the deed of assignment, but as we now know it was the posture adopted by the liquidator of BPP that triggered the claims and cross-claims which culminated in the agreements being entered into to resolve those claims and I do not think anything sinister can be read into the Liquidators not keeping APP fully informed of the same.

With regard to the Liquidators having filed Form 76 (for their release) four days before the expiry of the objection period and not sending the required forms or sending the wrong forms to APP, s. 355 of the Act states that such defects, irregularities or deficiency would not invalidate these proceedings. Although counsel for APP has submitted that the court's powers under s. 355 do not arise because the Liquidators have not applied to rectify any defects, I do not think it would be necessary to do so in this case as supplementary affidavits with the correct forms have been filed.

In my judgment a case for leave has not been made out on this ground.

3. Was there a distribution of surplus assets to the petitioner?

In an affidavit affirmed on behalf of APP by Mr. Ng Chai Choey on 20 August 2003 he alleged in paras. 14 to 18 and 24 to 28 that the Liquidators wrongfully:

(i) paid RM75 million to the secured creditors of the respondent;

(ii) paid RM24.9 million to the petitioner; and

(iii) distributed the entire surplus of RM1.5 million to the petitioner.

I regret to say that APP has got it wrong here. I agree with counsel for the Liquidators that the above complaints are misconceived for the simple reason that they do not concern the Liquidators of the respondent.

They concern the Liquidators of BPP. The correct position is in fact pointed out by Moores Rowland in para. 17 of their report where the source of the complaints is correctly identified to be Schedule A to the Framework Agreement. Moores Rowland explained, correctly, that Schedule A was a summary of 'the proposed final accounts of BPP1 (ie, Borneo Pulp & Paper Sdn Bhd) being restated upon the Lease Premium Issue being accounted for by STIDC (ie, the petitioner)'. And in the same paragraph, Moores Rowland dismissed the above complaints in this way:

> Therefore the grievances against the Liquidators of BPP2 (ie, the respondent) set out in paragraphs 14, 15, 17 and 18, 24 through 28 of Ng's Second affidavit (affirmed on 20th August, 2003) are misplaced.

Of course when the allegations made in Mr. Ng's affidavit were served on the liquidator of BPP, he naturally responded to these allegations denying any wrongdoing.

In so far as the respondent is concerned, there is no surplus for distribution. As I mentioned earlier, the settlement between the parties as embodied in the Framework Agreement resulted in a net liability of RM3.8 million to the petitioner. So on this ground too a case for leave has not been made out.

4. Were the Liquidators in breach of their duties in entering the Framework Agreement, against the advice of their Legal Advisors?

In considering this issue it will be necessary at the expense of some repetition to refer to the background facts again. In para. 18 of his affidavit in reply affirmed on 11 October 2003 Jeyaraj a/l Ratnasawamy (one of the Liquidators) set out the issues which were required to be resolved by the Liquidators upon their appointment, arising from their investigation into the affairs of the respondent and these issues were:

(i) the petitioner STIDC had made a claim against the respondent for the sum of RM105 million in respect of the plantation lands alienated to the respondent as described above;

(ii) the respondent had a claim against BPP for outstanding lease rentals under the sub-lease agreement amounting to the sum of RM101 million; and

(iii) BPP had a claim for uncalled share capital which had been issued to the respondent in the amount of RM81.4 million for shares which had been previously issued to the respondent to be satisfied via capitalisation of future lease rentals under the sub-lease.

So the Liquidators sought a legal opinion from their Legal Advisors on the legal effect of the resumption of the plantation lands by Government. The Liquidators were advised that the rights and obligations between BPP and the respondent in relation to the outstanding lease rentals (owed by BPP to the respondent) and the uncalled share capital (owed by the respondent to BPP, which was to have been paid by set off against part of the outstanding lease rentals) may arguably have been frustrated by the resumption of the said lands by the State Government, with the result that BPP may be discharged from its obligation to pay rentals to the respondent and the respondent being discharged from paying any calls on unpaid capital made by BPP.

The legal advisors further advised the Liquidators that it would be prudent to: seek opinion of lawyers in Sarawak on the sub-lease since it was subject to Sarawak Laws; to present the options available to the creditors and shareholders of the respondent; if the Liquidators decided to pursue that course, to apply to court for a declaration that the respondent has been discharged of its obligations under the shareholders agreement; that if such application to court was made, to expect a legal challenge from the Liquidators of BPP and/or APP.

APP now complains that the Liquidators failed to act in accordance with the advice they received and had breached ss. 236(1)(c) and (d) of the Act in failing to obtain the sanction either of the court or of the committee of inspection when they instead entered into the framework agreement and deed of assignment.

I do not agree with APP's complaints. The Liquidators did not follow any of the advice given by their Legal Advisors. They have explained why they took such a course. They did so to avoid protracted litigation and also because there was no real prospects of any recovery of the outstanding lease rentals due from BPP as the latter was insolvent. But, they instead reached an amicable settlement embodied in the framework agreement and deed of assignment. I have already, when setting out the background facts, explained how the disputes and issues which arose between the parties were resolved and will not repeat them here. I agree with counsel for the Liquidators that the Framework Agreement was in the best interest of the respondent as it provided a practical solution to all the outstanding claims faced by the respondent without the need

for protracted litigation and allowed the liquidation to proceed to completion without undue delay and expense. The concern of the Liquidators about getting enmeshed in protracted litigation was not imaginary - it was there in the advice of their Legal Advisors.

In this regard it is significant that even Moores Lowland in para. 44 of their report stated, with reference to the settlement arrived at, that from 'a purely commercial viewpoint it would appear that under the circumstances, the Framework Agreement and the deed of assignment represent a practical solution for BPP2 (ie, the respondent) to resolve its predicament caused by the land resumption'.

Equally important, the framework agreement did not have any financial impact on APP. Upon distribution in specie towards settlement of the respondent's liabilities, there is a net liability of RM3.8 million still owing to the petitioner. This has been further reduced to RM1.1 million after the distribution of the 2,775,005 shares in specie in part payment of the RM3.8 million owed, pursuant to a Supplementary Deed of Assignment entered into between the Liquidators and the petitioner on 19 November 2003 in the circumstance mentioned later on in this judgment.

Counsel for APP says the Liquidators are in breach of ss. 236(1)(c) and (d) of the Act when they did not obtain the necessary sanction referred to in the section before entering into the settlement agreements. I do not agree. After the respondent was wound up, the court granted specific powers to the Liquidators to enter into such agreements. There is, in my view, nothing in s. 236(1) to suggest that on making a winding up order the court may not grant any of the powers mentioned there to the Liquidators or that such authority can only be given when the Liquidators apply for a particular proposed exercise of the Liquidators' power, as counsel for APP now contends. It was counsel's submission that any argument that authority of the court had already been given cannot stand, because to construe the order made by the court in this way fails to take into account s. 236(3) of the Act which states:

> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of those powers.

According to counsel for APP, to give a liquidator prospective approval to enter any compromise will result in the court relinquishing control over the exercise of a liquidator's powers. It was said this cannot be the object behind s. 236(1) and that legislative intent is clearly set out in s. 236(3) which subjugates the exercise of the Liquidators' powers to control by the court.

In my view the fact that s. 236(3) subjects the exercise of the liquidators' powers to the control of the court would not prevent the court granting the powers mentioned therein to the liquidator when appointing him since it is apparent from the section itself that the court continues to retain control over a liquidator even after the granting of such powers as the words 'any exercise or proposed exercise' of any of those powers clearly envisages that the control can be exercised both before or after the exercise of those powers.

With regard to the decision in *See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299, it is my respectful view that the Court of Appeal was there dealing with a different fact pattern from that here, in that, in that case, the shareholder's petition sought an order which the winding up court did not have power to grant, namely, the distribution of assets in specie, and it was in that context that the Court of Appeal said that the only final order which a court may make on the hearing of a petition is either to direct a winding up or to dismiss the petition.

To recap on this issue, it is my view that in entering into the framework agreement and deed of assignment the Liquidators had discharged their duties honestly, independently and impartially. They did not compromise the interests of or cause any pecuniary loss to the respondent. They did not misappropriate or misapply the funds or assets of the respondent. Put in another way, the allegations of misfeasance or of breach of fiduciary duties towards the respondent and APP are totally unfounded.

Counsel for APP has said that neither APP's leave application nor the Liquidators' motion are the appropriate forum to decide the propriety or commercial sense of the settlement entered into or the monetary implications of the settlement and that an enquiry under s. 277(2) would be the more appropriate forum for this. I regret I do not agree. It is APP who makes the allegations. I do not think that on a mere assertion of wrongdoing the court should launch into an investigation or grant leave. A case must be made out for it, and, the Liquidators are entitled to show why the allegations are unfounded and leave should not be granted.

5. Was there a conspiracy between the Liquidators and the other parties to the framework agreement to cause the petitioner to be unjustly enriched?

From the allegation in support of conspiracy as contained in para. 56 of the draft statement of claim annexed to the affidavit of Ferry Siswojo Djongianto affirmed on 22 September 2003 APP's real complaint appears to be that the framework agreement caused the petitioner to be unjustly enriched in that:

(i) the petitioner retained the balance of the compensation paid by the Government for the resumption of the plantation lands;

(ii) the petitioner caused the respondent to recognise an invalid claim by the petitioner of RM105 million against it; and

(iii) the compensation for rentals receivable by the respondent from BPP was wrongfully diverted away from the respondent to the petitioner.

With regard to the accusation that the petitioner retained the balance of compensation for the resumption of the plantation lands paid by the Government, I find the accusation misplaced. From para. 16 of Jeyaraj's affidavit affirmed on 11 October 2003 and para. 30 of Yew Fooi's affidavit affirmed on 10 October 2003 (he is the liquidator of BPP), it is evident that the compensation for the resumption of the plantation lands was assessed at RM133 million. From this sum, RM121 million was deducted at source towards payment of the premium owing, leaving a balance of RM11.9 million which was paid directly to the secured lenders of BPP. So the balance of the compensation was not retained by the petitioner as alleged.

With regard to the complaint that the framework agreement caused the respondent to recognise an invalid claim of RM105 million by the petitioner, the accusation overlooks the crucial undisputed facts that the petitioner had injected the plantation lands into the respondent valued at RM105 million to be satisfied by the allotment by the respondent of RM105 million ordinary shares of RM1 each credited as fully paid and that these shares had not been allotted by the respondent to the petitioner as at the date of resumption of the plantation lands. I agree with counsel for the respondent that on the basis that the agreements between the parties had become frustrated and had become void by the resumption of the plantation lands, the petitioner had an arguable case against the respondent for the repayment of RM105 million under s. 66 of the Contracts Act 1950.

With regard to APP's accusation that the compensation of RM101 million for outstanding sub-lease rentals received from BPP was wrongfully diverted to the petitioner, I find the accusation without basis. As I mentioned earlier, this compensation from BPP was utilised to settle the respondent's outstanding liability of RM105 million owing to the petitioner arising from the injection of the plantation lands procured by it from the Sarawak State Government.

Accordingly I find nothing in the allegation regarding a conspiracy between the parties to the framework agreement, to cause financial loss to APP or to enrich the petitioner.

It must follow from what I have said above that APP has not discharged the onus upon it of making out a clear *prima facie* case for leave to commence action against the Liquidators for misfeasance.

I also find that no good reasons have been shown for a further inquiry into the conduct of the Liquidators under s. 277(2) of the Act.

I will now deal with the Liquidators' application for release and for the respondent to be dissolved. After arguments had concluded and I had reserved my decision, on being informed by counsel for the Liquidators that an asset comprising of 2,775,005 fully paid shares in BPP had been found remaining in the books of the respondent and the manner in which the Liquidators proposed to deal with these shares, I directed that the Liquidators file an affidavit to formally put the matter before the court.

On 19 November 2003 Mr Jeyaraj a/l Ratnaswamy affirmed an affidavit in which he disclosed that due to an oversight these 2,775,005 shares ('the 2.7 million BPP shares') were inadvertently omitted from the deed of assignment as his mind was focussed on carrying out the assignment of the 8.4 million shares as provided in the Framework Agreement. Mr Jeyaraj stated that the Liquidators had taken steps to assign the 2.7 million BPP shares to the petitioner as distribution in specie at par in part settlement of the remaining RM3.8 million owing by the respondent to the petitioner and exhibited a supplemental deed of assignment dated 19 November 2003 which had been executed between the Liquidators and the petitioner for that purpose.

APP objects to the course taken by the Liquidators in respect of the 2.7 million BPP shares. The following issues have arisen for resolution as a result of APP's objections:

(i) Whether the failure to distribute the 2.7 million BPP shares prior to the filing of the motion to discharge the Liquidators and dissolve the respondent rendered the motion *void ab initio* or frivolous or vexatious or an abuse of process of Court? ('the first issue').

(ii) Whether the distribution of the 2.7 million BPP shares constitutes a bias towards the petitioner at the expense of APP ('the second issue').

With regard to the first issue, it is my view that the failure to distribute the 2.7 million BPP shares prior to the filing of the motion did not render the Liquidators' motion *void ab initio* as alleged because the application has not been determined and is still pending before the court. Counsel for the Liquidators referred me to *Re-Budget Floor Coverings Pty Ltd* [1982] 1 ACLC 312. In that case the liquidators of the company applied to be

released, for the company to be dissolved, and for an order that the company's books and records be destroyed within a period rather than the period prescribed by the Act. In the course of the hearing, the court found that the affidavit in support of the application did not satisfy the statutory requirements of s. 239 and the related rules. However, the court did not dismiss the application, but instead adjourned the matter to enable the requirements to be satisfied. So too here. There is no need to dismiss the motion as the Liquidators have taken steps to distribute the asset, disclosed this in affidavits filed in this court and there is evidence before the court that all the assets of the respondent that were realised by the Liquidators have now been fully distributed.

I also do not find the motion to be frivolous or to have been filed vexatiously or as an abuse of process because I accept the Liquidators' explanation that their omission to distribute the 2.7 million BPP shares was the result of inadvertence on their part. In fact the 2.7 million BPP shares are disclosed in the Final Report of the Liquidators which is attached as exh. B to the motion. In Appendix I of the Report, it is disclosed at item 2.7 that the assets of the respondent comprised, *inter alia*, an investment of RM2,775,007 in BPP. I accept, therefore, that through genuine inadvertence these shares were omitted from the deed of assignment.

With regard to the second issue, I agree with counsel for the Liquidators that the distribution of the 2.7 million BPP shares to the petitioner did not constitute a bias to the petitioner at the expense of APP for the following reasons:

(a) As a consequence of the Framework Agreement, the respondent's liability to the petitioner arising from the resumption of the plantation lands was not fully discharged but was reduced to RM3.8 million.

(b) Thus, the 2.7 million fully paid up shares in BPP remaining in the respondent's books did not form surplus assets available for distribution to contributories. They had to be applied towards the discharge of the respondent's debt of RM3.8 million owing to the petitioner.

(c) So no question of any bias towards the petitioner arises from the assignment of the said shares to the petitioner.

I have not overlooked the complaint of APP that the effect of the framework agreement and the deed of assignment was a complete settlement of the claims of the petitioner and that by now distributing the 2.7 million shares to the petitioner, the Liquidators must be seen as showing a bias towards the petitioner. It is quite apparent to me however, that the attention of the parties

were mainly focussed on resolving the issues which arose from the stand taken by the liquidator of BPP regarding the compensation of RM133 million for the resumption of the plantation lands. As preamble (D) to the framework agreement shows, the parties were 'desirous of amicably settling the issues, disputes, claims, cause of action and matters arising out or in connection with the Lease Premium Issue' so as not to unnecessarily delay the dissolution of the respondent and BPP. In such circumstances I can understand the 2.7 million BPP shares being inadvertently left out of the settlement. But the framework agreement itself states that the parties were negotiating in good faith and the covenant to discharge and release each other, which is contained in cl. 6.1 of the framework agreement is limited to the lease premium issue. Seen in that light I do not think the framework agreement and the deed of assignment was a complete settlement of all the petitioner's claims. As such I do not regard the Liquidators' distribution of the 2.7 million BPP shares to the petitioner as being tainted with bias as alleged.

To conclude, on the materials that have been placed before the court, I am satisfied that the Liquidators have realised so much of the property of the respondent as in their opinion they can and that all the assets of the respondent so realised have been distributed. Consequently the liquidation of the respondent should not be protracted needlessly.

In the result, I dismiss APP's application for leave to commence proceedings for misfeasance against the Liquidators with costs.

I grant the Liquidators' application to be released. I also order that the respondent be dissolved. The other prayers set out in the motion are also granted in terms.